

Consolidated Services, Inc. and United Food & Commercial Workers Union, Local 1657, AFL-CIO, chartered by UFCW International Union, AFL-CIO-CLC, Petitioner. Case 15-RC-7843 (formerly 26-RC-7642)

July 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held October 31, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 7 for and 6 against the Petitioner, with 5 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has decided to affirm the hearing officer's report and recommendations.

The Employer operates a dining facility under contract. At issue is whether Senior Cooks Hartwell Laubsch, Lynn Smith, and Herman Benavente are statutory supervisors and, thus, ineligible to vote in the election. We agree with the hearing officer that they are not supervisors. Accordingly, we find that they are eligible to vote in the election and we shall overrule the challenges to their ballots.¹

The hearing officer found that the senior cooks do not have the authority to hire, suspend, promote, discharge, or transfer employees, or effectively to recommend such action.² He also found, and we agree, that the authority exercised by senior cooks in assigning and directing the work of employees is routine and consistent with preexisting guidelines established by the Employer. In that regard, the evidence shows that the facility manager is responsible for developing the daily production schedule, i.e., the list of menu items to be prepared. There is no evidence that the senior cooks unilaterally can alter the production schedule. After the facility manager has completed the production schedule, the senior cook enters the name of the employee who will prepare each item, based on the senior cook's experience and observation of whether

an employee has the necessary skill.³ Employees prepare individual menu items in accordance with recipes maintained by the Employer. The senior cook monitors food preparation and, if necessary, assists other employees in preparing food according to the recipes. The facility manager reviews and signs the completed production schedule at the end of the day.

On these facts, we agree with the hearing officer's conclusion that the exercise of authority by senior cooks in assigning and directing the work of employees is routine and based on their superior knowledge and cooking experience—akin to that of a leadman—and does not require the exercise of independent judgment. *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

The Employer also contends that the senior cooks train, and effectively recommend promotion of, cook-trainees. Senior Cook Laubsch testified that he performs on-the-job training by example, i.e., by cooking while a trainee observes and participates, and by pointing out mistakes. His testimony also establishes that any employee who observes a mistake can correct the mistake. Similarly, senior cooks evaluate trainees by observing their work and certifying that trainees have demonstrated competency to perform employer-established food preparation and related tasks.⁴ The facility manager reviews these evaluations. The facility manager also seeks oral input from senior cooks in deciding whether to promote cook-trainees and has delayed promotions following such consultations. There is no evidence, however, that the facility manager follows senior cooks' recommendations without making an independent investigation. In these circumstances, the fact that promotions were delayed for some trainees based on senior cooks' input does not constitute effective recommendation. *Brown & Root, Inc.*, supra. Accordingly, we find that senior cooks do not exercise statutory supervisory authority in evaluating trainees.

The Employer also contends that senior cooks can discipline employees. There is no evidence that senior cooks have issued oral or written reprimands. The Employer relies on evidence of two instances involving conflicts between senior cooks and other employees. In one incident, Senior Cook Longo received a written reprimand for losing his temper and yelling at another employee regarding a dishwashing assignment.⁵ Longo was instructed to "counsel your subordinates" rather

¹ We adopt, in the absence of exceptions, the hearing officer's recommendation to overrule the challenge to the ballot of Jeffrey Woodcock.

The parties have stipulated that Brenda Allen is an eligible voter and that her challenged ballot should be opened and counted.

² Sec. 2(11) defines supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

³ Except for the large volume of food prepared, menu items do not appear to be complicated. Production schedules in evidence list items including burgers, frankfurters, grilled cheese sandwiches, chicken filets, french fries, rice, sliced tomatoes, corn-on-the-cob, cottage cheese potato salad, gelatin, cookies, and fruit crisp.

⁴ There is no evidence that senior cooks evaluate employees other than cook-trainees in an on-the-job training program.

⁵ Significantly, the written warning issued to that employee for her failure regarding the dishwashing assignment was signed, not by Longo, but by the facility manager and the assistant facility manager.

than engage in such “unacceptable” behavior. In the second incident, an employee filed a complaint against Senior Cook Laubsch for “harassment by my superior.”⁶ Although these incidents suggest the existence of a hierarchy among employees, it does not necessarily follow that the senior cooks are statutory supervisors. We find that, at most, these incidents show that the Employer does not tolerate discourtesy by senior cooks to employees.

Because we find that Senior Cooks Laubsch, Smith, and Benavente do not possess any of the statutory indicia of supervisory status, we find, in accord with the hearing officer, that they are employees, not supervisors.⁷ Accordingly, we shall overrule the challenges to their ballots and direct that their ballots be opened and counted.

ORDER

It is ordered that the challenges to the ballots of Brenda Allen, Jeffrey Woodcock, Hartwell Laubsch, Lynn Smith, and Herman Benavente are overruled.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 15, who shall open and count the ballots of Brenda Allen, Jeffrey Woodcock, Hartwell Laubsch, Lynn Smith, and Herman Benavente within 10 days of the date of this decision, and issue the appropriate certification.

MEMBER COHEN, dissenting in part.

Contrary to my colleagues, I find that Senior Cooks Laubsch, Smith, and Benavente are supervisors by virtue of their power to assign, direct, evaluate, and make effective recommendations regarding the promotion and retention of trainees.

It is clear that senior cooks exercise independent judgment in assigning employees to prepare menu items listed on the production schedule. That is, the senior cooks make the decision as to which employees are to prepare specific menu items.¹ Senior Cook Laubsch testified, without contradiction, that in selecting the employees to prepare these items, he decided which employee “would be the most sufficient cook” to prepare an item or combination of items. In making such assignments, the senior cook must balance em-

ployee skills with the logistical demands of food production and service, and this balancing must be done in a limited period of time. Such an assignment, based on personal judgment and expertise, is the essence of independent judgment.²

Further, senior cooks responsibly direct and monitor employee preparation of assigned menu items, and they are held responsible for failure to meet the standards and requirements of the production schedule. Thus, Senior Cooks Benavente and Laubsch received written reprimands for failing to verify completion of an assigned food production task by a subordinate employee, which conduct resulted in an insufficiency of food.

I further find that senior cooks evaluate cook-trainees and effectively recommend their promotion or retention in trainee status. Senior cooks complete extensive daily evaluations of trainees’ progress in food handling and preparation methods, sanitation, personal hygiene, security procedures, and work-related interpersonal skills. They can make, and have made, written comments on the evaluation forms. The facility manager reviews and initials the evaluations. Facility Manager James Woodcock testified that the evaluations, along with further consultation with senior cooks, play a “major role” in promotion or retention decisions.

Consistent with the foregoing, it is undisputed that senior cooks have recommended retaining trainees for an additional 60-day period in trainee status before being promoted, and that the facility manager has acted on the basis of those recommendations. My colleagues apparently rely on the hearing officer’s finding that “the evidence did not show that the recommendation of the senior cooks was followed without an independent investigation” by the facility manager. However, the fact that the facility manager may have made an independent investigation does not contradict the evidence that he also relies on the recommendation of the senior cook. And, as the facility manager testified, the senior cook’s recommendation plays a major role in the decision.

Based on the above, I conclude that senior cooks assign employees to specific work tasks, responsibly direct them, and effectively recommend promotion, retention, and probationary period extensions. Any one of these powers would confer supervisory status. I therefore conclude that the senior cooks are supervisors.

⁶There is no evidence regarding the disposition of this matter. The alleged harassment involved Laubsch’s assigning the employee to prepare menu items that she was not qualified to prepare, and being unavailable to assist her. We have found that Laubsch (and other senior cooks) are not supervisors because they do not exercise independent judgment in assigning, monitoring, and training employees.

⁷In the absence of primary indicia of supervisory authority, evidence of secondary indicia, such as that proffered by the Employer, cannot provide a basis for a supervisory finding. *Northcrest Nursing Home*, 313 NLRB 491, 500 (1993); *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993).

¹Items ranged in complexity from condiments and beverages to sandwiches, cooked entrees and side dishes, and baked deserts. All had to be prepared for service within a 2-hour period.

²See generally my dissenting opinions in *Providence Hospital*, 320 NLRB 717 (1996) and *Ten Broeck Commons Nursing Home*, 320 NLRB 806 (1996).